

IN THE SUPREME COURT OF MISSISSIPPI

COURT OF APPEALS

**SWEET VALLEY MISSIONARY APPELLANT
BAPTIST CHURCH A/K/A HUB
COMMUNITY BAPTIST**

NO. 2010-TS-01807

VERSUS

**ALFA INSURANCE CORPORATION APPELLEE
A/K/A ALFA GENERAL INSURANCE
CORPORATION A/K/A ALFA MUTUAL
GENERAL INSURANCE COMPANY
A/K/A ALFA SPECIALTY INSURANCE
CORPORATION**

BRIEF OF APPELLANT

**APPEALED FROM THE CIRCUIT COURT
OF MARION COUNTY, MISSISSIPPI**

ORAL ARGUMENT REQUESTED

**MARC L. FRISCHHERTZ, (*Pro Hac Vice*)
FRISCHHERTZ, POUILLIARD,
FRISCHHERTZ & IMPASTATO, L.L.C.
1130 ST. CHARLES AVENUE
NEW ORLEANS, LA 70130
TELEPHONE: (504) 523-1500
FACSIMILE: (504) 581-1670**

**DAVID L. BREWER, (# [REDACTED])
BREWER LAW FIRM
249 LOUISIANA AVENUE
MCCOMB, MS 39648
TELEPHONE: (601) 341-8756
FACSIMILE: (866) 545-7876
*ATTORNEYS FOR APPELLANT***

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel for Appellant, Sweet Valley Missionary Baptist Church a/k/a Hub Community Baptist, certifies that the following parties have an interest in the outcome of this case. These representatives are made in order that the Court may evaluate possible disqualifications or recusal.

1. Sweet Valley Missionary Baptist Church a/k/a HUB Community Baptist, Appellant;
2. Marc L. Frischhertz, Frischhertz, Poulliard, Frischhertz, & Impastato, L.L.C., Counsel for Appellant;
3. David L. Brewer, Brewer Law Firm, Counsel for Appellant;
4. Alfa Insurance Corporation a/k/a Alfa General Insurance Corporation a/k/a Alfa Mutual General Insurance Company a/k/a Alfa Specialty Insurance Corporation, Appellee;
5. Toby J. Gammill, Wilkins Tipton, P.A., Counsel for Appellee;
6. Whitney Gladden, Wilkins Tipton, P.A., Counsel for Appellee;
7. Mississippi Farm Bureau Mutual Insurance Company, Defendant;
8. Patrick H. Zachary, Zacahry Leggett, PLLC, Counsel for Defendant No. 7; and

9. Honorable Tony Mozingo, 15th Circuit District, for the County of Marion.

THIS the 15th day of September, 2011.

MARC L. FRISCHMANTZ

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STATEMENT OF THE ISSUES

The sole issue presented for review by the appellate court is whether the trial court erred in granting Defendants' Motion to Dismiss.

STATEMENT OF THE CASE

A. Nature of the Case

Plaintiff respectfully submits that its cause of action is not time barred for two (2) reasons: 1.) The trial court's June 29, 2009 Judgment dismissing Plaintiff's cause of action without prejudice, did not become a final judgment until January 29, 2010 when the Court disposed of Plaintiff's Motion to Set Aside Judgment or in the Alternative, Motion for New Trial. Therefore because Plaintiff re-filed its Complaint on that very same day, January 29, 2010, this cause of action is not time barred; and additionally, or alternatively, 2.) Under Mississippi Code § 15-1-69, known as the Savings Statute, Plaintiff had one (1) year from after the abatement or other determination of the original suit to commence a new action for the same cause and therefore, the Complaint filed on January 29, 2010 is not time barred.

B. Statement of Facts

This case arises from damage to property of Sweet Valley Missionary Baptist Church a/k/a Hub Community Baptist, (Hereinafter referred to as "Sweet Valley"), which occurred as a result of Hurricane Katrina. Plaintiff originally filed a Complaint in this matter on August 29, 2008 where after Defendants were timely served with Summons. That case was Sweet Valley Missionary Baptist Church v. Miss. Farm Bureau et. al, Case No. 2008-0337, Marion County Circuit Court.

On January 6, 2009, counsel for Plaintiff, Marc L. Frischhertz, filed a Verified Application for Pro Hac Vice Admission. Thereafter, on or about January 22, 2009, a letter was received from the Mississippi Bar Association certifying to the Clerk of the Supreme Court that

payment had been received as required by Rule 46(b)(5). On December 17, 2008, and January 20, 2009, undersigned counsel, Marc L. Frischhertz, received Interrogatories and Requests for Production of Documents from Defendant, Alfa Insurance Corporation. In April 2009, a member of Mr. Frischhertz's staff contacted the Clerk of Court for Marion County to inquire as to the status of the Pro Hac Vice admission. At that time, undersigned counsel's office was informed that the Order had been granted which prompted a request that a copy of the Order be forwarded to undersigned's office. Based on the belief that the Order granting Pro Hac Vice admission had been signed, undersigned counsel, Marc L. Frischhertz, signed the discovery responses and Expert Designation, and forwarded them to opposing counsel for Defendants.

Thereafter, when an Order granting Pro Hac Vice admission was not received, undersigned counsel once again contacted the Clerk's office. The Clerk's office then informed undersigned counsel, Marc L. Frischhertz, that there was no record of the Pro Hac Vice admission ever having been filed. Undersigned counsel contacted the Mississippi Supreme Court Clerk's office, and at this time learned that there was technical deficiency in the Application in that it did not contain undersigned counsel's home address. This still did not explain the lack of a copy of the Verified Application for Pro Hac Vice Admission in the record with the Marion County Clerk's office. Therefore, undersigned counsel re-filed an entirely new Motion for Pro Hac Vice Admission and attached a stamped copy of the original Motion for Pro Hac Vice Admission which had been filed in January 2009.

As stated previously, during the time that undersigned counsel's Motion for Pro Hac Vice was believed to be pending and granted, undersigned counsel corresponded with and received formal discovery from counsel for Defendant, Alfa Insurance Corporation. In the meantime, counsel for Defendant, Alfa Insurance Corporation, filed a Motion to Dismiss for failure to comply with discovery. This was apparently set for hearing on July 1, 2009. When it came time

to setting that hearing, counsel for Alfa Insurance Corporation provided no communication, or notice, of any hearing to undersigned counsel, Marc L. Frischhertz. This despite the fact that at the very least, there was a pending Motion for Pro Hac Vice filed in the matter, a copy of which had been provided to counsel for Alfa.

On or about July 3, 2009, counsel, Marc L. Frischhertz, received a copy of an Order dismissing Case No. 2008-0337 without prejudice. This Order of dismissal stemmed from a Motion to Preclude Evidence and Motion to Strike Plaintiff's Experts filed by Defendant, Alfa Insurance Corporation. The Order of dismissal by the trial court was expressly without prejudice. *See Rec. p. 177.*

Plaintiff, aggrieved of the judgment dismissing the matter without prejudice, on July 8, 2009 filed a Motion to Set Aside Judgment or, In the Alternative, Motion for New Trial which was filed within ten (10) days and therefore, timely under the Mississippi Rules of Civil Procedure. On January 29, 2010, hearing on Appellant's Motion to Set Aside Judgment or in the Alternative Motion for New Trial took place at which time the Court denied Appellant's requested relief. On that same day, Appellant filed a new Complaint against the same Defendants for payment of insurance proceeds for damages resulting from Hurricane Katrina. Defendant, Alfa, filed a Motion to Dismiss the new Complaint alleging that it was time barred. That matter came for hearing before the trial court, and on September 23, 2010, the trial court granted Defendant's Motion to Dismiss stating that the January 29, 2010 Complaint was time barred under the statute of limitations.

Sweet Valley submits that the filing of its original Complaint on August 29, 2008 tolled the running of the statute of limitations. Plaintiff further submits that the timely filing of a Motion to Set Aside Judgment or in the Alternative Motion for New Trial on July 8, 2009 suspended the effects of that Judgment until such time as the Court issued judgment on

Plaintiff's Motion for New Trial. On January 29, 2010, Judgment was rendered denying Plaintiff's Motion for New Trial. Plaintiff submits that it is on that day that the statute of limitations began to run again. Because Plaintiff re-filed its Complaint on that same day, January 29, 2010, said Complaint is within the statute of limitations and timely.

SUMMARY OF THE ARGUMENT

Plaintiff submits that the trial court erred in granting Defendant's Motion to Dismiss for two reasons. First, the timely filing of a Rule 59 Motion for New Trial suspended the execution and effects of the dismissal without prejudice in July 2009 of Appellant's first complaint. That judgment did not become final until the denial of Plaintiff's motion for new trial, which occurred on January 26, 2010. On that same day, Plaintiff filed a new complaint, which is the subject of this appeal. The timely filing of a Motion for New Trial suspends the judgment. Therefore, while the motion for new trial was pending it was as if the judgment had not been rendered. Thus the statute of limitations could not have run.

Second, under the savings statute, Appellant had one year after the dismissal to refile its complaint. The new complaint was filed well within one year of the dismissal without prejudice; therefore, is not time barred.

The trial court's decision in this matter and reasoning takes away Plaintiff's right to file a Motion for New Trial. In the reasons for judgment, the trial court states that an immediate appeal of the dismissal without prejudice would have prevented the running of the statute of limitations, but that Plaintiff's Motion for New Trial did not. *See Rec. p. 203.* This is contrary to well established case law that holds that the timely filing of a motion for new trial suspends the effect of a judgment.

ARGUMENT

1. Plaintiff's January 29, 2010 Complaint is Not Time Barred Because the Statute of Limitations Was Tolded Until January 29, 2010.

On June 29, 2009, the Court dismissed Plaintiff's cause of action without prejudice. On July 8, 2009, Plaintiff timely filed a Motion for New Trial under Rule 59 of the Miss. R. Civ. Proc. Regardless, the Mississippi Supreme Court has held that regardless of how styled, a motion questioning the correctness of a judgment and timely made within ten (10) days thereof will be treated under Rule 59. *Bruce v. Bruce*, 587 So.2d 898, 902 (Miss. 1991). In *Bruce*, the Supreme Court cited approvingly Federal interpretations of Rule 59 stating that, "Rule 59(e) embraces motions urging reconsideration of matters properly encompassed in a decision of the merits." *Id.* at 903. This is important because, as stated by the Supreme Court in *Bruce*, a motion under Rule 59 stays the enforceability of the judgment. *Id.*

The fact that a timely filed Motion for New Trial extends the finality of a judgment until the motion is disposed of, has long been the law in Mississippi. In *Laurel Oil and Fertilizer Co. v. McCraw*, 172 So. 503 (Miss. 1937), the Mississippi Supreme Court stated that the motion for a new trial, seasonable made within the period of ten (10) days, extended the judgment until the motion for a new trial was disposed of, thus extending the time for appeal until ten (10) days from the date the judgment was entered overruling the motion for a new trial. *Id.* at 503; *See also State Mortgage Investment Co. v. Barnes*, 340 So.2d 14, 15 (Miss. 1976)(treating a motion to reinstate appeal as analogous to a motion for new trial and thus, tolls the statute of limitations on perfecting an appeal).

Mississippi Rule of Civil Procedure 62(a) states that "no execution shall be issued upon a judgment nor shall proceedings be taken for its enforcement until the expiration of ten days after the later of its entry or the disposition of a motion for a new trial." The comment to Rule 62 further states that this stay prevents the enforcement of a judgment as defined in Rule 54(a).

M.R.C.P. 62 cmt. Coleman v. Mallory, 944 So. 2d 72, 75 (Miss. Ct. App. 2006); *See Bruce v. Bruce*, 587 So.2d 898 (Miss.1991) (Rule 59 motions stay the running of the thirty day time period for appeal purposes and for the enforceability of the judgments); *Davidson v. Hunsicker*, 224 Miss. 203, 79 So.2d 839 (1955) (judgment is not final until motion for a new trial is overruled). “No statute of limitations runs against party until he is allowed by law to do thing as to which statute is interposed.” Moore v. Montgomery Ward & Co., 171 Miss. 420, 156 So. 875 (1934); *see also*, Shaw v. Bula Cannon Shops, 205 Miss. 458, 470, 38 So. 2d 916, 918 (1949) (holding the motion for a new trial suspended it as a final judgment until overruled).

In *Coleman*, the Court of Appeal reversed the trial court and found that the motion for new trial stayed the enforceability of the judgment and that therefore the defendant should not have been found in contempt for failure to pay within the time prescribed. *Coleman*, 944 So.2d at 75. Where a motion for new trial is timely filed, the judgment is not a final judgment. It is the ruling on the motion for a new trial, which is the final judgment in the case. Lurel Oil & Fertilizer Co. v. McCraw, 178 Miss. 117, 172 So. 503, 503 (1937).

The statutes and law are clear that the timely filing of a motion for new trial suspends the effects of and stays the judgment. Additionally, it is clear that where a motion for new trial is timely filed, the judgment is no longer a final judgment and it is the judgment denying the motion for new trial that is the final judgment. Plaintiff submits that the law is clear that a judgment from which a party has timely filed a motion for new trial has no effect until the court rules on the motion for new trial.

The trial court’s Order of Dismissal upon which this appeal is based, is contrary to the well-established law cited herein. The trial court states that because Plaintiff chose to file a motion for new trial instead of an appeal, the statute of limitations continued to run. This is contrary to the well-established rule that the filing of a motion for new trial suspends the effect

of the judgment. The trial court's interpretation of the law essentially takes away Plaintiff's right to file a motion for new trial, effectively removing it as a remedy, and leaving Sweet Valley with only the option of appeal. This cannot be a proper interpretation of the law.

ACTION WAS STILL PENDING

Appellant could not have filed a new complaint until the trial court ruled on the motion for new trial. The judgment of dismissal without prejudice was rendered on June 29, 2009. *See* Rec. p. 177. Plaintiff filed a timely motion for new trial on July 8, 2010. Plaintiff could not legally file a new complaint based on that same transaction or occurrence until the trial court ruled on the motion for new trial. Neither could appellant have filed an appeal. Once the motion for new trial was filed, the June 29, 2009 judgment was no longer a final judgment. Any second complaint filed while the motion for new trial was pending would be subject to dismissal based on the fact that a complaint predicated on the same transaction or occurrence was still pending.

As admitted by Defendant in its Motion to Dismiss, the statute of limitations did not run on Plaintiff's cause of action until October 14, 2008. Plaintiff originally filed its Complaint on August 29, 2008. The court denied Plaintiff's Rule 59 Motion on January 29, 2010 and on that very same day, Plaintiff re-filed the same cause of action.

Because the statute of limitations was tolled until Plaintiff's Motion for New Trial under Rule 59 was disposed of, Plaintiff's Complaint filed on the same day the Motion for New Trial was disposed of, it is timely under Mississippi law and not barred.

2. Under the Savings Statute, Plaintiff had One (1) Year to Re-file Its Cause of Action and Therefore, Plaintiff's Complaint is Not Time Barred.

Miss. Code § 15-1-69 provides:

If in any action, duly commenced within the time allowed, the writ shall be abated, or the action otherwise avoided or defeated, by the death of any party thereto, or for any matter of form. . .the Plaintiff may commence a new action for the same cause, at any time

within one (1) year after the abatement or other determination of the original suit.

Plaintiff submits that the savings statute applies in that this matter was dismissed for a matter of form after being duly commenced.

The Savings Statute was first enacted in 1848 and is, “Highly remedial. . .and ought to be liberally construed for the accomplishment of the purpose for which it was designed, namely, to save one who has brought his suit within the time limited by law from loss of his right of action by reason of accident or inadvertence. . .” *Arceo v. Tolliver*, 19 So.3d 67, 74 (Miss. 2009)(citations omitted). In further describing the applicability of the savings statute, the Mississippi Supreme Court stated:

Where the plaintiff has been defeated by some matter not affecting the merits, some defect or informality, which he can remedy or avoid by a new process, the statute shall not prevent him from doing so, provided he follows it promptly, by suit within a year.

Id. at 74 (citing *Hawkins v. Scottish Union and National Insurance Company*, 110 Miss. 23, 69 So. 710 (1915)). In this case, Defendant’s obtained a Motion to Dismiss without prejudice based in large part, as argued and cited by Defendant, of undersigned counsel, Marc L. Frischhertz’s, signing of discovery and expert designations prior to the granting of his Pro Hac Vice Admission. As stated previously in Plaintiff’s Motion for New Trial, this was done so without the knowledge of undersigned counsel in that he firmly believed that the Order granting his Pro Hac Vice Admission had been signed by the Court. This defect does not touch upon the merits of Plaintiff’s cause of action and therefore, falls squarely within the purview of the Savings Statute. The original dismissal of the first complaint was based upon failure to answer discovery and expert designations. However, the discovery and expert designation had in fact been made months prior to the dismissal, the only defect being that they were signed by Marc

Frischhertz, whose pro hac vice admission had yet to be granted. Thus, substantively the discovery and expert designation had been made, it was deficient as a matter of form.

In *Tolliver*, the Mississippi Supreme Court held that the savings statute, Mississippi Code Section 15-1-69, applied to the facts of the case. The plaintiff had filed her first complaint without adhering to the notice requirements of Miss. Code Ann. § 15-1-36(15) (Rev. 2003). *Arceo v. Tolliver*, 19 So.3d at 71. As a result, the complaint was dismissed without prejudice. Although to failure was clearly that of the plaintiff's, because it did not touch on the merits of the claim, the Supreme Court held that it fell within the purview of the Savings Statute. *Id.* at 74.

Likewise, in *Marshall v. Kansas City Southern Railways Co.*, 7 So.3d 210 (Miss. 2009), the Mississippi Supreme Court held that the one year savings statute applied. The plaintiff filed a complaint in state court that was removed to federal court. The federal court denied plaintiff's motion to remand. *Id.* at 211. Meanwhile, another case arising out of the same accident, proceeded to trial in federal court with a verdict returned in favor of the defendant. *Id.* The plaintiff, learning of the verdict, moved for entry of final judgment under Rule 54 in favor of the defendant. The plaintiff confessed judgment in favor of the defendant. *Id.* at 212. The plaintiff then appealed the denial of their motion to remand. The Federal Fifth Circuit refused to consider the appeal, finding that the dismissal was without prejudice.

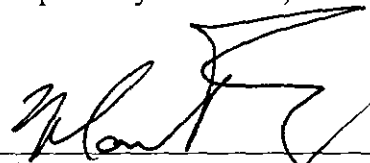
The plaintiff thereafter refiled their complaint in state court on August 16, 2004. The defendant once again removed the case to federal court; however, this time a different federal judge remanded the matter back to state court. The defendants then sought dismissal under the statute of limitations. *Id.* at 213. The trial court dismissed the matter with prejudice as time-barred and held that the voluntary dismissal without prejudice was not a dismissal as a matter of form. The Court of Appeals affirmed. The Supreme Court held that even though the plaintiff

voluntarily dismissed their case, the dismissal was as to a matter of form, and the savings statute applied. *Id.* at 216.

CONCLUSION

Plaintiff respectfully requests that this honorable Court reverse the decision of the trial court and remand this matter for further proceedings. Plaintiff's Complaint is not time barred because the prior complaint and motion for new trial continued to suspend the running of the statute of limitations. On the same day Plaintiff's motion for new trial was denied, Plaintiff filed its new complaint. Additionally, this dismissal fell within the purview of Mississippi savings statute, and Plaintiff refilled its Complaint within one year of the dismissal.

Respectfully submitted,



Marc L. Frischhertz, (*Pro Hac Vice*)
FRISCHHERTZ, POUILLARD,
FRISCHHERTZ & IMPASTATO, L.L.C.
1130 St. Charles Avenue
New Orleans, LA 70130
Telephone: (504) 523-1500
Facsimile: (504) 581-1670

David L. Brewer, (██████████)
BREWER LAW FIRM
249 Louisiana Avenue
McComb, MS 39648
Telephone: (601) 341-8756
Facsimile: (866) 545-7876
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have mailed by First Class Mail, postage prepaid, a true copy of the foregoing Brief of Appellant, Sweet Valley Missionary Baptist Church a/k/a HUB Community Baptist, to:

Hon. Tony Mozingo
Circuit Court Judge
P.O. Drawer 269
Purvis, MS 39475

Toby J. Gammill and Whitney Gladden
Wilkins Tipton, P.A.
4735 Old Canton Road, Suite 108
Jackson, MS 39211

Patrick H. Zachary
Zachary & Leggett, PLLC
211 S. 29th Avenue, Suite 211
Hattiesburg, MS 39402

THIS the 15th day of September, 2011



MARC L. FRISCHERTZ